Supreme Court, U.S.
FILED

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No.

In The

# Supreme Court of the United States

October Term, 1994

STATE OF KANSAS,

*Petitioner,*

v.

JOSE L. VALENZUELA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Kansas Court Of Appeals**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Fourth Amendment mandates that consent searches require that the consenting party *in fact* made a free choice, or whether it is sufficient that the searching officer had an *objectively reasonable belief* that consent had been granted?

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## OPINIONS BELOW

The Opinion of the Kansas Court of Appeals is not reported and is reprinted at App. 1. The order of the Kansas Supreme Court denying Petitioner's Petition for Review of the Kansas Court of Appeals decision is reprinted at App. 9. The opinion of the District Court is not reported and is reprinted at App. 10.

## JURISDICTION

The Kansas Court of Appeals entered judgment on March 4, 1994. On April 26, 1994, the Kansas Supreme Court denied Petitioner's Petition for Review. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257(a).

This Court has jurisdiction to consider this Petition for a Writ of Certiorari. When a state court decision is clearly based on state law that is both adequate and independent, this Court will not review the decision. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-77 (1983). But when "a State Court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law," this Court requires that a state court decision contain a " 'plain statement' that [it] rests upon adequate and independent State grounds," *Id.* at 1040, 1042, 103 S.Ct., at 3476, 3477; othewise, "we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so." *Id.* at 1041, 103 S.Ct., at 3476. *See also Illinois v. Rodriguez*, 497 U.S. ___, 110 S.Ct. 2793, 2798 (1990). In this case, Petitioner based arguments

to the Trial Court and the Appellate Court on Federal law. The Appellate Court's opinion contains no "plain statement" that its decision rests upon state law. The Appellate Court's opinion does not rely on any specific provision of the Kansas Constitution, nor the Kansas Constitution generally. Further, as the Kansas Supreme Court has stated, "the command of our federal and state constitutions is the same: The right of the people to be secure in their persons and property against unreasonable searches and seizures shall not be violated, and no warrant shall issue but on probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or property to be seized (U.S. Constitution, Fourth Amendment; Kansas Bill of Rights 15)." *State v. McMillin*, 206 Kan. 3, 5, 476 P.2d 612 (1970).

## FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

### FOURTH AMENDMENT TO THE U.S. CONSTITUTION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. § 1257

**§ 1257. State Courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

## STATEMENT OF THE CASE

On April 18, 1993, Steven C. Harvey, Kansas Highway Patrol trooper, was on duty and on regular patrol of Interstate 70 in Trego County, Kansas. At approximately 1:01 p.m., Trooper Harvey checked the speed, with radar, of an eastbound vehicle traveling along Interstate 70. The radar reading indicated that the vehicle was traveling 72 miles per hour. Interstate 70 at that location is posted as a 65 m.p.h. zone. Trooper Harvey's normal practice in such situations is to visually inspect the vehicle for the presence of a license tag, and he did so in this case. Initially, Trooper Harvey could not see a license tag on the car, so he pursued the vehicle, and upon overtaking it observed that it was licensed in the State of Arizona. Trooper Harvey initiated a registration check through the Highway Patrol dispatcher in Norton, Kansas, and the dispatcher replied that the vehicle was registered to a

female. Trooper Harvey observed that there were two males and no females in the car. Trooper Harvey then initiated a stop of the vehicle near mile post 138 on east bound Interstate 70. Trooper Harvey established contact with the driver of the vehicle, the Respondent herein, and eventually issued a warning for the speeding violation and a warning for failure to wear a seat belt. Trooper Harvey recognized that the Respondent was, at times, having difficulty understanding him, so Trooper Harvey utilized the passenger, a Martin A. Carranza, to interpret oral communication between Trooper Harvey and the Respondent. Trooper Harvey asked Mr. Carranza to inform the Respondent of the violation of the posted speed limit and the seat belt law. Upon translation, the Respondent nodded in a manner common to an affirmative reply. At that point Trooper Harvey asked Mr. Carranza if there were any guns, drugs, or large amounts of money in the vehicle. Mr. Carranza said no. Trooper Harvey asked Mr. Carranza to ask the Respondent the same question, as interpreter. The Respondent's reaction to the translation was a nod common to a negative reply. Based upon the situation, to include the conversation with Mr. Carranza and the Respondent (via Mr. Carranza) and visual observations, Trooper Harvey concluded that Mr. Carranza and the Respondent had something to hide.

Trooper Harvey, an experienced and highly trained law enforcement officer, had made observations at the scene that he recognized as indicators common to persons involved in the drug trade, those being:

1. Insurance on the automobile had been paid up for a year.

2. Jugs of water and Gatorade were in the back seat.

3. Fast food wrappers were in the back seat.

4. As viewed through the car's hatchback window, there appeared to be very little clothing or luggage in the car.

5. The Respondent was taking an indirect route from Arizona to Kentucky.

6. There was a strong odor of aftershave lotion emanating from the car.

7. None of the occupants of the car was the registered owner.

8. The car was registered in a state (Arizona) that borders Mexico (Mexico being a common source of illegal narcotics).

9. The nervous demeanor of the Respondent.

Because of these indicators, Trooper Harvey requested consent of the passenger, Mr. Carranza, if he, Trooper Harvey, could search the vehicle. Mr. Carranza said yes. Trooper Harvey then asked Mr. Carranza to ask the Respondent the same question in Spanish. The Respondent, as translated by Mr. Carranza, said yes and gave a nod commonly associated with an affirmative reply. Trooper Harvey then asked Mr. Carranza and the Respondent to step out of their vehicle, which they did.

Upon executing a search of the automobile, marijuana in the aggregate weight of 49 pounds 9.2 ounces was discovered. In addition to charges against Mr. Carranza, the Respondent was charged with:

1. Possession of marijuana with the intent to sell, deliver, distribute, or dispense.

2. Failure to possess a tax stamp.

3. Conspiracy to possess marijuana with the intent to sell, deliver, distribute, or dispense.

On June 28, 1993, the District Court of Trego County, Kansas, entered an order suppressing the admissibility of the marijuana as evidence on grounds that there was neither consent nor probable cause to conduct a warrantless search. App. 10.

The Petitioner challenges the suppression order, contending that Trooper Harvey had objectively and reasonably concluded, at the time of search, that voluntary consent had been granted by the Respondent, Jose L. Valenzuela, to search the automobile in which he was the driver.

The Trial Court's order suppressing the admissibility of the evidence has been affirmed by the Kansas Court of Appeals. App. 1. The Kansas Supreme Court has denied Petitioner's Petition for Review. App. 9.

## REASONS FOR GRANTING THE PETITION

The question presented to this Court is, as one commentator has put it, "whether consent searches inevitably require that the consenting party *in fact* made a free choice, or whether it is sufficient that the police had a reasonable belief that a free choice had been made." 3 W. LaFave, Search and Seizure – A Treatise on the Fourth

Amendment, 156 (2d Ed. 1987). "Whether the constitutionality of consent searches depends on whether the consenting party *in fact* made a free and competent choice and consented or requires only that the police had a reasonable belief that a voluntary consent was given is unsettled in this Circuit and is unclear in much of the caselaw." *Metcalf v. Long*, 615 F.Supp. 1108, 1116, n. 10 (D. Del. 1985). This Petition is for the purpose of providing this Court an opportunity to further clarify the meaning of Fourth Amendment "unreasonable searches and seizures" in the context of consensual searches and seizures in general; in particular because of the serious implications it carries for consent searches in a mult-cultural and an increasingly multi-lingual society. The State of Kansas (Petitioner) believes that the Kansas Court of Appeals' (Appellate Court) approach to the Fourth Amendment and its concomitant impact on the suppression of evidence in the prosecution of criminal cases was overly mechanistic and contrary to the case by case determination of objective reasonableness, based upon *all* the facts, required by the Fourth Amendment. Resolution of this issue will settle a split of authority that currently pervades this aspect of Fourth Amendment jurisprudence.

Petitioner asserts that the proper Fourth Amendment standard to be applied in the legal determination of whether consent to search was given is that of objective reasonableness, which must be based upon the totality of the circumstances. *Cf. United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981): "In evaluating the validity of the stop [courts] must consider 'the totality of the

circumstances – the whole picture.' " Reasonableness is to be determined from the facts and the circumstances. *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507 (1967). What this case is about, in sum, is whether apparent consent to search is consistent with the Fourth Amendment's command of reasonableness. This case is not about a passenger's standing to grant consent to search the car; passengers often do not enjoy legal standing to object to an automobile search. *See Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978). *See also Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556 (1980); *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547 (1980). Nor is this case about apparent authority to consent to a search. *See Illinois v. Rodriguez, supra.* This case *is* about the standard by which the issue of *consent itself* will be judged. This Court has never directly addressed the issue of whether the Fourth Amendment mandates that consent searches require that the consenting party *in fact* made a free choice, or whether it is sufficient that the searching officer had an *objectively reasonable belief* that consent had been granted.

The constitutional issue applicable to the judicial inquiry into "consent" is one that has drawn sharply conflicting views among various appellate courts. LaFave, *supra*, p. 157. The seminal holding in the line of cases that embrace the standard requiring that the consenting party *in fact* made a free choice is *United States v. Elrod*, 441 F.2d 353 (5th Cir. 1971), which held that "[n]o matter how genuine the belief of the officers is that the consenter is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judicially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or

unfounded. It is that the key to the validity – consent – is lacking for one of mental capacity, no matter how much concealed." In dicta, the *Metcalf* court, *supra*, was of the opinion that in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973), this Court "impliedly indicated agreement with the *Elrod* approach by condemning consents given under coercion and requiring a focus on the actual voluntariness of the consent." The *Elrod* holding that it is the government's obligation to prove the consenting party's state of mind at time of search has been cited and followed in some jurisdictions. *See United States v. Gay*, 774 F.2d 368, 377 (10th Cir. 1985): "It is elementary that one must know he is giving consent for the consent to be efficacious;" *United States v. Rambo*, 789 F.2d 1289, 1297 (8th Cir. 1986) quoting *Elrod*: "[T]he question is one of mental awareness so that the act of consent was the consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions;" *United States v. Marcello*, 508 F.Supp. 586, 601 (E. D. La. 1981); *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (Ariz. 1992); *State v. Koucoules*, 343 A.2d 860, 873 (Me. 1974): "[T]he question of voluntariness necessarily includes a *knowing* approval and involves an inquiry as to the capacity of the consenting party to give a knowledgeable and intelligent consent, which also is a question of fact."

Many jurisdictions have taken the contrary position, however, and have held that the Fourth Amendment proscription against unreasonable searches and seizures simply requires that a searching officer hold an objectively reasonable belief, at the time of search, that consent had been granted. *See United States v. Gorman*, 355 F.2d

151 (2d Cir. 1965); *People v. Henderson*, 33 Ill.2d 225, 210 N.E.2d 483, 485 (Ill. 1965): "Officers, as reasonable men, could conclude that defendant's consent was given;" *People v. Lumpkin*, 64 Mich.App. 123, 235 N.W.2d 166, 167, 168 (1975): "[T]he law today is that knowledge of the right to refuse is but one factor in the totality of the circumstances to be examined in construing the reasonability of a search" and the appropriate standard to apply is whether "the search was reasonable;" *State v. Ruiz*, 360 So.2d 1320 (Fla.App. 1978); *State v. Swank, et al.*, 399 So.2d 510, 513 (Fla.App. 1981): The question is whether "the actions of the police were reasonable, noncoercive, and did not involve misrepresentation, deceit or trickery."

Petitioner contends that this latter line of cases adopt and apply the proper federal constitutional standard in that they analyze whether a searching officer, upon an objective review, reasonably believed *at the time of search* that consent to search had been granted. Petitioner alleges, *inter alia*, that the *Elrod* decision and its progeny is constitutionally problematic because they adopt a reading of the Fourth Amendment that contravenes its purpose, that being to prohibit "unreasonable" searches and seizures. As a practical consequence, the *Elrod* line of cases places the government in a highly tenuous position of having to prove the state of mind of a defendant at a suppression hearing, if the consent *in fact* is denied by the defendant. The implications and ramifications are thereby obvious; even if the government proves that the communication between the defendant and the officer was entirely voluntary, in conformance with *Schneckloth v.*

*Bustamonte, supra,* the government would face the additional and often untenable burden of proving what the defendant meant, *in fact.* Petitioner alleges that this troublesome aspect of *Elrod* interjects a powerful incentive for post search revisionism by a purportedly consenting defendant. It is easy to imagine the myriad of factual determinations a court would face prior to determining whether an *Elrod* consent had been granted. Petitioner is concerned that courts would be tempted to revisit, and perhaps revivify, the "no sane man" rule of *Higgins v. United States,* 209 F.2d 1819 (D.C. Cir. 1954).

*Higgins* held that where a person denying his guilt purportedly consented to a search which resulted in the ready discovery of highly incriminating evidence, it could not be said that there was "true consent" for "no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." That the issue of consent turns upon a cynical hindsight assessment of whether consent *in fact* had been granted is the theoretical nexus between *Higgins* and *Elrod;* that these two lines of cases could merge into one is therefore theoretically plausible. It is a highly defective legal premise that a search pursuant to consent *in fact* is evidence enough of some aberrant mind set of the consenting party, because consensual searches in which incriminating evidence is found are conducted with a high degree of frequency in this country. Additionally, the *Higgins/Elrod* line of cases creates an extraordinary constitutional loophole for crafty criminals; such criminals could lure police officers into a reasonable (but mistaken) belief that consent to search had been granted and allow the search to proceed to the point of the

discovery of incriminating evidence. Subsequently the criminal would complain that consent had not, *in fact*, been granted, thereby requiring suppression of any evidence obtained pursuant to the purported consent. As one court critical of *Higgins* has noted: "Acceptance of this contention would mean that expressions of consent could relieve officers of the need of obtaining a warrant only when the speaker was not aware that the search would disclose damaging evidence – a fact usually not within the officer's knowledge. Such a ruling not only would almost destroy the principal permitting a search on consent but would enable experienced criminals to lay traps for officers who, relying on the words of consent, failed to secure a search warrant that would have been theirs for the asking. Where, as here, no force or deception was either used or threatened, we see no reason why a court should disregard a suspect's expression of consent . . . " *United States v. Gorman*, 355 F.2d 151 (2d Cir. 1965). That the Fourth Amendment always requires factually correct conclusions by a searching officer is a premise that this Court has pointedly dismissed as not constitutionally sound; the argument that "reasonableness must be judged by the facts as they were, rather than by the facts as they were known . . . has long since been rejected" by this Court. *Illinois v. Rodriguez*, 497 U.S. at ___, 110 S.Ct. at 2800, f.n.

In this case the agent for the state, Trooper Steven C. Harvey, initiated a stop of an automobile driven by the Respondent. The Respondent did not and has not contested the validity of the stop. At the suppression hearing the Respondent challenged whether consent in fact had been given to search the automobile. The uncontroverted

facts are that the trooper enlisted the passenger in the automobile as an interpreter to seek consent from the Respondent, because the trooper believed utilization of the passenger as interpreter was reasonable at the time. The trooper's actions were based upon his observation that the Respondent was not fluent in English, though the Respondent did demonstrate a rudimentary understanding of the English language, and because the passenger in the automobile appeared to the trooper to be considerably more fluent in the English language than the Respondent. After concluding that, through the passenger, the trooper was able to effect oral communication with the Respondent, the trooper utilized the passenger as an interpreter for purposes of soliciting consent from the Respondent to search the automobile. The trooper's actions were predicated upon a belief that using the passenger as interpreter was the most reasonable (and perhaps best) way to communicate with the Respondent.

In affirming the Trial Court's suppression of the admissibility of the illegal narcotics, the Appellate Court sided with the Trial Court in finding that Respondent "was not fluent in English and that Trooper Harvey did not understand Spanish, nor did he understand the exchange between [Respondent] and the passenger." App. 4. As the Appellate Court noted, "the record shows that Trooper Harvey recognized [Respondent] was having difficulty understanding parts of what the trooper was asking. The trooper testified that while [Respondent] seemed to understand parts of the conversation, he sometimes misunderstood everything. Trooper Harvey did not ask [Respondent] directly for consent to search, but asked the passenger to ask [Respondent] for the consent. The

trooper testified he did not speak Spanish *but believed he could make himself understood and understand what was being said.*" App. 3-4 (emphasis added). The Appellate Court affirmed the Trial Court in holding that because the trooper could not, *in fact,* understand the question posed via the passenger, nor understand, *in fact,* the answer of the Respondent prior to translation, the State could not prove consent, *in fact,* and ordered the evidence suppressed. App. 4.

Petitioner contends that the Appellate Court's analysis was incorrect because it was not based upon the reasonableness of the searching officer's actions. "The touchstone of the Fourth Amendment is reasonableness." *Katz v. United States,* 389 U.S. at 360, 88 S.Ct. at 516. Clearly, the Fourth Amendment does not proscribe all government initiated searches and seizures, it merely proscribes those which are unreasonable. *Illinois v. Rodriguez,* 497 U.S. at ___, 110 S.Ct. at 2799. As stated in *Illinois v. Rodriguez,* 497 U.S. at ___, 110 S.Ct. at 2800: "it is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government – whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement – is not that they always be correct, but they always be reasonable."

The trooper undertook to solicit consent to search from the Respondent in a manner he deemed most likely to effectuate his request to the Respondent. It is uncontroverted that the trooper could not speak Spanish, that

he had in the trunk of his patrol car consent forms written in the Spanish language, and that he could have solicited the assistance of a Spanish speaking officer (though the trooper would have had to detain the Respondent for a time until the Spanish speaking officer arrived; a scenario problematic in itself). App. 4. But it is equally uncontroverted that the trooper believed he could make himself understood by the Respondent and understand what the Respondent was saying, by utilization of the passenger as an interpreter. App. 4. The Appellate Court's recitation of what the trooper *did not* do to support the suppression of the evidence interjects an extraordinary element of "unrealistic second-guessing" warned against in *United States v. Montoya de Hernandez*, 473 U.S. 531, 542, 105 S.Ct. 3304, 3311 (1985). The reasonableness of the trooper's decision to solicit consent through the passenger of the automobile should not be interpreted as *per se* unreasonable simply because of the availability of Spanish language consent forms or the possibility of procuring a Spanish speaking law enforcement officer. To draw an analogy from a recent decision of this Court, the reasonableness of the officer's decision does not turn on the availability of alternative consent seeking techniques. *Cf. United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1587 (1989).

The Appellate Court seemed to misconstrue the purpose of the Fourth Amendment. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonable' upon the exercise of discretion by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653-654, 99 S.Ct. 1391, 1395-1396 (1979). This Court has often recognized that law enforcement officers

routinely confront situations that demand spontaneous decision making. "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949). Petitioner contends that whether, *in fact*, the trooper had alternative means of soliciting consent from the Respondent is therefore inapposite to the outcome of this case, for, to draw an appropriate analogy from *Illinois v. Rodriguez, supra*, whether the basis for the Respondent's consent exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgments; and all the Fourth Amendment requires is that they answer it reasonably.

Whereas in *Illinois v. Rodriguez, supra*, this Court held that warrantless entry is valid when based upon consent of a third party whom police, at time of entry, reasonably believe to possess common authority over the premises, but who in fact does not, it must also be true that a warrantless search of an automobile, judged against all the facts, is valid when based upon consent translated by a third party whom police, at time of search, reasonably believe to have accurately translated the request for consent and the response thereto. To delve into an analysis of whether or not the passenger *in fact* actually and accurately translated the request, or the Respondent actually and *in fact* understood the request as translated, presents an unreasonable hurdle for the state, one which Petitioner contends is not contemplated by the Fourth Amendment.

Petitioner contends that an officer's determination of consent to search must be judged against an objective standard: would facts available to the officer at the moment of search warrant a person of reasonable caution in the belief that consent to search had been obtained? If the answer to this query is no, then Petitioner agrees the warrantless search without further inquiry is unlawful unless *actual* consent had been granted; but if the answer to the query is in the affirmative, Petitioner contends the search is valid and any evidence discovered subsequent thereto, provided the search was within the scope of the apparent consent, should be admissible. *Cf. Illinois v. Rodriguez, supra.* Just as the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness, so too the standard for measuring whether in fact the suspect consented at all is properly that of "objective" reasonableness.

Trooper Harvey reasonably concluded at the time of search that he had the Respondent's consent:

1. as translated by the passenger;

2. as substantiated by the Respondent's mannerisms and non-verbal response;

3. as confirmed when the Respondent exited the car at the trooper's request;

4. as corroborated by the Respondent's failure to manifest any explicit limitation on the search of the automobile. *See Florida v. Jimeno,* ___ U.S. ___, 111 S.Ct. 1801, 1804 (1991).

For the Appellate Court to conclude that the search was a proscribed "unreasonable" search and seizure as contemplated by the Fourth Amendment is a strained and overly mechanistic deviation from the Fourth Amendment's basic test of objective reasonableness. *Cf. Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983).

This Court has held that the Fourth Amendment does not assure a defendant that no government search will occur unless the defendant actually consents, but rather that no search will occur that is "unreasonable." *See Illinois v. Rodriguez, supra.* Petitioner contends that the Fourth Amendment's requirement of "reasonableness" of search does not demand that the government be factually correct in its assessment of whether consent was *in fact* actually obtained, but whether from the facts available to the officer at the time of search, it was *objectively reasonable* to conclude that consent to search had been granted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT DESIGNATED FOR PUBLICATION
No. 70,050
IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS,
*Appellant,*

v.

JOSE L. VALENZUELA,
*Appellee.*

MEMORANDUM OPINION

Appeal from Trego District Court; TOM SCOTT, judge. Opinion filed March 4, 1994. Affirmed.

*Bernard T. Giefer, Jr.*, county attorney, for appellant.

*Steven P. Flood*, of Hays, for appellee.

Before BRISCOE, C.J., LARSON, J., and TIMOTHY E. BRAZIL, District Judge, assigned.

*Per Curiam:* The State of Kansas appeals the trial court's order suppressing evidence obtained during the stop of an automobile driven by Jose Valenzuela.

Trooper Steven Harvey clocked a white Pontiac Firebird at 72 miles per hour in a 65 miles per hour zone. He decided to pursue the car after noticing it did not have a license tag. As he caught up with the Firebird, he observed that the car did have a license tag. He ran a check on the registration of the vehicle and was told it was registered to a "female." After observing that the car was occupied by two men, he proceeded to stop the vehicle.

Trooper Harvey asked the driver of the car, Valenzuela, for his driver's license and proof of insurance and registration. Valenzuela produced a valid driver's license and proof of insurance, but was only able to produce an old registration with a woman's name on it. Trooper Harvey noted the Valenzuela's insurance had been paid for a year in advance.

While the trooper was standing next to the car, he noticed a strong odor coming from the car. To him it smelled like bad after-shave. He observed there were food wrappers, a gallon of water, and an empty Gatorade bottle in the backseat. He also noticed there were no clothing bags or hanging clothes in the car. As he walked around the car, he looked through the hatchback window and noticed very few pieces of luggage.

Trooper Harvey asked Valenzuela to exit his car and go to the trooper's vehicle. There the trooper issued Valenzuela a warning for speeding and for failure to wear a seat belt. When he asked Valenzuela where he was going, Valenzuela said he and his passenger were on their way to Kentucky to work. However, the trooper noted that at times Valenzuela could not understand anything the trooper said.

Trooper Harvey indicated that based on his observations he began to suspect that Valenzuela was transporting drugs. He returned to the Firebird with Valenzuela and asked the passenger, Mr. Caranza, to translate what he was saying to Valenzuela. He then asked Valenzuela, through Caranza, whether he had any guns, drugs, or large amounts of cash. When the reply was negative, Trooper Harvey asked if he could search the vehicle.

According to Trooper Harvey, Valenzuela nodded affirmatively. Trooper Harvey proceeded to search the vehicle and ultimately discovered approximately 50 pounds of marijuana.

Valenzuela subsequently filed a motion to suppress which was ultimately granted. The State appeals.

*Did the trooper have a valid consent to search the vehicle?*

"The trial court's findings with regard to the existence and voluntariness of a consent to search will not be overturned on appeal unless clearly erroneous." *State v. Johnson,* 253 Kan. 356, Syl. ¶ 1, 856 P.2d 134 (1993).

> "The resolution of this issue depends upon whether the consent . . . was made voluntarily and understandingly. . . .
>
> " . . . 'The existence and voluntariness of a consent to search and seizure is a question of fact to be decided in light of attendant circumstances by the trier of facts and will not be overturned on appeal unless clearly erroneous.' [Citation omitted.]" *State v. Montano,* 18 Kan. App. 2d 502, 508, 855, P.2d 979 (1993).

The State has the burden to prove by a preponderance of the evidence that the defendant's consent to search was voluntary. *Johnson,* 253 Kan. 356, Syl. ¶ 3.

The record shows that Trooper Harvey recognized Valenzuela was having difficulty understanding parts of what the trooper was asking. The trooper testified that while Valenzuela seemed to understand parts of the conversation, he sometimes misunderstood everything. Trooper Harvey did not ask Valenzuela directly for consent to search, but asked the passenger to ask Valenzuela

for the consent. The trooper testified he did not speak Spanish but believed he could make himself understood and understand what was being said. He also testified that if a suspect does not understand English, the trooper normally has consent to search forms written in Spanish. He also could call for the assistance of other troopers who have been trained to speak and understand Spanish. Trooper Harvey did not use these forms or call for the assistance of a Spanish-speaking officer because he felt Valenzuela understood what he was saying.

If a trial court's findings on a motion to suppress are supported by substantial evidence, an appellate court will not substitute its view of the evidence for that of the trial court. *State v. Garcia,* 250 Kan. 310, Syl. ¶ 2. 827 P.2d 727 (1992).

Here, the trial court found that Valenzuela was not fluent in English and that Trooper Harvey did not understand Spanish, nor did he understand the exchange between Valenzuela and the passenger. The trial court also noted that the trooper used the passenger to obtain the consent to search. The trial court then ruled that the State failed to prove Valenzuela had consented to the search of the vehicle. There was substantial competent evidence to support the trial court's findings.

*Did the trial court err in ruling that the State had failed to sustain its burden to prove that the trooper had probable cause to conduct a warrantless search?*

"Upon the hearing of a motion to suppress evidence, the State bears the burden of proving to the trial court the lawfulness of the search and seizure. An appellate court will uphold a trial court's suppression of evidence if that

ruling is supported by substantial competent evidence." *State v. Garcia,* 250 Kan. 310, Syl. ¶ 1.

The trooper testified that be [sic] became suspicious based on the following observations:

1. The insurance on the automobile had been paid up for a year;
2. there were jugs of water and Gatorade in the backseat;
3. there were fast food wrappers in the backseat;
4. there appeared to be little clothing or luggage in the car;
5. Valenzuela was taking an indirect route from Arizona to Kentucky;
6. there was a strong odor of after-shave lotion emanating from the car;
7. the car was titled to someone other than the driver or passenger;
8. the occupants were Hispanic;
9. the car was registered in Arizona; and
10. the defendant was nervous.

The State appears to argue that the strong smell of after-shave was sufficient to provide probable cause to search pursuant to *State v. McDonald,* 253 Kan. 320, 856 P.2d 116 (1993). In *McDonald,* the Supreme Court ruled that the odor of marijuana could provide sufficient probable cause to justify a warrantless search. 253 Kan. at 325. The State contends that, under the totality of the circumstances, Trooper Harvey could reasonably believe that the

after-shave was being used to mask the smell of illegal drugs.

The State's interpretation of *McDonald* is overly broad. While numerous cases have established that when a law enforcement officer smells marijuana he has probable cause to search a vehicle, the State fails to point to any case where the smell of a legal substance which could mask another smell provides probable cause. See Annot., 5 A.L.R. 4th 681. We note that no after-shave was found in the car.

The trial court ruled that, while collectively the above factors "*might* rise to the level of justifying further investigation, . . . they [did not] rise to the level of probable cause." The trial judge ruled that he would never issue a search warrant based upon such information.

The Kansas Supreme Court reviewed a similar factual situation in *State v. Garcia,* 250 Kan. 310. In *Garcia,* a Kansas Highway Patrol Trooper stopped a car for changing lanes on Interstate 35 without signaling a lane change. After giving the driver a warning ticket, the trooper asked to search the car. The driver initially refused but, after repeated requests by the trooper, signed a written consent. A search of the car revealed a quantity of marijuana.

The trial court in *Garcia* ruled that after the officer issued the warning ticket, he essentially made another seizure by not allowing Garcia to leave without badgering him into signing the consent. When questioned as to why he wanted to search Garcia's vehicle, the trooper testified:

1. Garcia indicated his brother owned the car when in fact it was owned by someone else. The trooper believed Garcia did not know who owned the vehicle.

2. A suitcase, clothing, and toiletries were in the backseat rather than in the trunk, where most people carry their clothing.

3. A quart of oil and tools were on the floorboard of the car. The trooper believed this consistent with drug dealers who do not want car problems.

4. A map was in the vehicle. The trooper indicated this was "typical of someone that would be smuggling narcotics." 250 Kan. at 315.

The trial court in *Garcia* ruled that the trooper's second seizure did not pass constitutional scrutiny because the trooper did not have a reasonable articulable suspicion of a crime being committed and the scope and duration of the seizure exceed the duration of the initial stop. The trial court therefore suppressed the evidence obtained as a direct result of the unlawful seizure, finding the consent given was involuntary. 250 Kan. at 316. The Kansas Supreme Court subsequently affirmed the trial court's suppression of the evidence, noting that the trial court did not find the trooper to be a credible witness and that Garcia had been detained twice the time of a normal routine stop for a lane change violation.

A review of the record in the instant case shows a similar set of circumstances. The end result was that the trial court did not believe Trooper Harvey had probable cause justifying the warrantless search and suppressed

the evidence that was found in the subsequent search. Therefore, the trial court's ruling that the evidence be suppressed because of an unlawful search and seizure is supported by substantial competent evidence. The State simply did not sustain its burden to show that this warrantless search and seizure was reasonable under any construction of statute or case law.

Affirmed.

DISTRICT CASE NO. 93CR2525

SUPREME COURT ORDER

IN THE SUPREME COURT
OF THE STATE OF KANSAS

COUNTY ATTORNEY, TREGO COUNTY
TREGO COUNTY COURTHOUSE
WAKEENEY KS 67672

STATE OF KANSAS,

APPELLEE,

V NO. 93-70050-AS

JOSE L. VALENZUELA,

APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY STATE OF KANSAS. CONSIDERED BY THE COURT AND DENIED.

DATE: 04/26/94.

CAROL G. GREEN
CLERK

IN THE DISTRICT COURT OF
TREGO COUNTY, KANSAS

STATE OF KANSAS,
PLAINTIFF

VS. CASE NO. 93 CR 24

MARTIN A CARANZA,
DEFENDANT

STATE OF KANSAS,
PLAINTIFF

VS. CASE NO. 93 CR 25

JOSE L. VALENZUELA,
DEFENDANT

ORDER
(Filed June 28, 1993)

Now on this 15th day of June, 1993 the above entitled matter comes before the court on each of the defendant's motion to suppress evidence. The Defendant, Caranza appears in person and by his attorney, Philip Stover. The Defendant Valenzuela appears in person and by his attorney, Steven P. Flood. The State of Kansas appears by the Trego County Attorney, Bernard T. Giefer, Jr.

It was agreed that the evidence on the motion to suppress would be presented through the use of the transcript of the preliminary hearing held on May 7, 1993.

Thereupon the court heard the argument of counsel and took the matter under advisement for a later determination.

Now on the June 24, 1993, the court makes the following findings and orders.

The automobile the defendants were riding in were [sic] stopped by Trooper Harvey for speeding, 72 in a 65 MPH zone. Mr. Valenzuela was driving the vehicle and Mr. Caranza was a passenger. Trooper Harvey through his training became suspicious that the defendants were transporting illegal drugs. Trooper Harvey's suspicions are based on the following:

1. Insurance on the automobile had been paid up for a year.
2. Jugs of water and Gatorade were in the backseat.
3. Fast food wrappers were in the backseat.
4. There appeared to be very little clothing or luggage in the car.
5. Taking an indirect route from Arizona to Kentucky.
6. A strong odor of cheap after shave lotion.
7. The car was titled in the name of some one other than the driver or passenger.
8. The occupants of the car were Hispanic.
9. The car was registered in a State that borders Mexico. (Arizona)

The driver of the car was not fluent in the english language. Trooper Harvey used the passenger as an interpreter to gain what Trooper Harvey calls an informed consent. However it is clear that Trooper Harvey does not understand spanish and did not understand the exchange between the defendants.

Trooper Harvey proceeded to search the vehicle and found some 41 pounds of marijuana under the spare tire. The defendants were subsequently charged with possession with intent to sell, conspiracy and no tax stamp.

At the preliminary hearing the defendant Valenzuela's mother testified that she had loaned the car to her son and that she is the registered owner. There was no evidence that Mrs. Valenzuela knew or gave any permission for possession to the defendant Caranza.

First in regard to the defendant Caranza the court finds that he had no standing to challenge the search of the vehicle. He was not an owner of the vehicle or an owner or possessor of the Marijuana. In addition there is no evidence that he had ever been in possession of the car in any other capacity than as a passenger. The third thing that might have given Mr. Caranza standing was an improper stopping of the vehicle but that is not the case here. Even though trooper Harvey admitted that he doesn't normally stop a vehicle for 7 miles over the speed limit it is still a violation of law sufficient to justify the stop.

Second in regard to the defendant Valenzuela the court finds that he does have standing to challenge the search that Trooper Harvey made of the vehicle. He was the driver of the vehicle, his Mother was the titled owner, and she had given him permission to use the car. All of the forementioned [sic] is sufficient to give him a possessory interest.

In the present situation there are only two ways the State can justify the warrantless search. One is through a finding of probable cause and the other is by consent.

The State bases it's argument for probable cause on the factors above enumerated by Trooper Harvey. None of them individually can remotely be considered as probable cause to search. Collectively they **might** rise to the level of justifying further investigation. Certainly in this courts mind they don't rise to the level of probable cause. This court would never issue either a search warrant or an arrest warrant on such information.

It is unclear from the record how much english either one of the defendants could understand. Obviously Tooper [sic] Harvey was unsure enough about Mr. Valenzuela's understanding of the English language that he tried to use the other defendant as an interpreter. The officer had Mr. Caranza ask Mr. Valenzuela for permission to search. But the officer couldn't understand the question or the answer. The State must prove consent and it is unable to do so.

**NOW THEREFORE IT IS ORDERED ADJUDGED AND DECREED** that the motion to suppress filed by Mr. Caranza is denied, and that the similar motion on behalf of Mr. Valenzuela is granted, and none of the evidence seized by Trooper Harvey shall be used in the prosecution of Mr. Valenzuela.

/s/ Tom Scott
TOM SCOTT, DISTRICT JUDGE